

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

KARIAH ENTERPRISES, LLC,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NO. 05-021

CORRECTED
ORDER GRANTING
PARTIAL SUMMARY JUDGMENT

Kariah Enterprises, LLC (Kariah), filed an appeal with the Pollution Control Hearings Board (Board) on February 11, 2005. Kariah is challenging the Department of Ecology's (Ecology) denial without prejudice of Kariah's application for a Federal Water Pollution Control Act¹ (hereinafter Clean Water Act) Section 401 Water Quality Certification (§ 401 Certification) for its proposed residential development project in Battle Ground, Washington.

Kariah filed a Motion for Partial Summary Judgment on Issue (a), which is one of two legal issues in this case. Ecology, in its response to this motion, has requested the Board to grant partial summary judgment to it on this issue. Legal issue (a) in this appeal, as stated in the March 17, 2005, Pre-Hearing Order, is as follows:

Whether Ecology's denial without prejudice of Appellant's request for a Clean Water Act Section 401 water quality certification for the proposed project was proper, considering:

¹ 33 U.S.C. 1251, *et seq.*

1 (a) Whether Ecology has the authority to deny Appellant's application on the basis that
2 Ecology did not accept the wetland delineation reviewed by the U.S. Army Corps of
3 Engineers in 1999.

4 Stephen F. Hill and LeAnne M. Bremer represent Appellant Kariah Enterprises, LLC.
5 Joan M. Marchioro, Senior Counsel with the Attorney General's Office, represents Respondent
6 Ecology.

7 The Pollution Control Hearings Board (Board) comprised of William H. Lynch,
8 presiding, and Bill Clarke, Chair, reviewed the pleadings and record pertinent to the motions in
9 this case.²

10 In rendering its decision, the Board considered the following submittals:

- 11 1. Petitioner's Motion for Partial Summary Judgment.
- 12 2. Petitioner's Memorandum of Points and Authorities in Support of Motion for
13 Partial Summary Judgment.
- 14 3. Declaration of Ed Greer in Support of Petitioner's Motion for Partial Summary
15 Judgment with attached exhibits.
- 16 4. Department of Ecology's Response to Petitioner's Motion for Partial Summary
17 Judgment with attachments.
- 18 5. Declaration of Brad Murphy with attached exhibits.
- 19 6. Declaration of Perry Lund.
- 20 7. Petitioner's Reply in Support of Motion for Partial Summary Judgment.

21 Having fully considered the record in this case and being fully advised, the Board enters
the following ruling:

² David W. Danner presided for the Board at the pre-hearing conference, but Mr. Danner's seat was vacant at the time this motion was argued before the Board.

1
2 DISCUSSION

3 This motion pertains to whether Ecology may require an individual applying for a Clean
4 Water Act Section 404 Permit (§ 404 Permit) for the purpose of filling wetlands to submit
5 additional information regarding the delineation of wetlands for Ecology to consider in making
6 its decision on the issuance of a § 401 Certification, when the U.S. Army Corps of Engineers
7 (Corps) has approved a wetland delineation for the site. The Board grants Partial Summary
8 Judgment to Ecology on this issue.

9 FACTUAL BACKGROUND

10 [1]

11 Kariah proposes to construct Iron Horse Park I, a 42-lot subdivision on approximately 15
12 acres east of Battle Ground, Washington. The site is situated within the Salmon Creek drainage.
13 Because the project will result in the filling of wetlands³ on the site an individual § 404 Permit is
14 required from the Corps. A request for a § 404 Permit requires the applicant to also obtain a §
15 401 Certification from Ecology.

16 [2]

17 Applied Technology Wetlands & Forestry Consultants first delineated the wetlands on
18 the Iron Horse Park I site in April 1997 for Cal Ek, the previous owner of the property. The
19 Corps conducted a field review on March 31, 1999. The entire site within the property

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21 ³ Kariah states approximately 4.52 acres of wetlands will be filled. *Declaration of Ed Greer in Support of
Petitioner's Motion for Partial Summary Judgment.*

1 boundaries was traversed during the site visit. The wetland boundaries were revised as a result
2 of this site visit. The revised boundaries were reflected in an updated wetland report and
3 attached map. *Ecology Ex. 3.* On September 3, 1999, the Corps issued Mr. Ek a jurisdictional
4 determination that concurred with the wetland boundaries delineated in the revised wetland map.
5 The jurisdictional determination from the Corps stated it was valid for five years from the date of
6 the letter “unless new information warrants revision of the delineation prior to this date.”
7 *Ecology Ex. 4.* The five-year time period in the jurisdictional determination by the Corps ended
8 September 3, 2004.

9 [3]

10 The Corps issued a Public Notice of Application (Corps Reference No. 2000-4-01571) on
11 April 9, 2001, for Mr. Ek’s application for the § 404 Permit. *Ecology Ex. 5.* A notice of request
12 for a 401 Certification was filed with Ecology on the same day. Ecology denied the § 401
13 Certification request on April 9, 2002. Ecology’s denial was based upon the lack of a planting
14 plan for the mitigation area; the lack of clarity regarding the assessment of functions for the
15 impact area and mitigation site; the need for greater details regarding performance standards, the
16 nature of the proposed restoration, and the hydrology monitoring and contingency measures; and
17 whether the proper mitigation ratios were being employed. *Ecology Ex. 6.* The Corps denied the
18 404 Permit without prejudice for failure to obtain the § 401 Certification on July 1, 2003.
19 *Ecology Ex. 7.*

1 [4]

2 During the spring of 2003, Brad Murphy, who was employed by Ecology as a wetland
3 specialist at the time, was reviewing the wetland delineation for Iron Horse Park II. This
4 proposed project is located adjacent to Iron Horse Park I. Mr. Murphy compared the data sheets
5 from the Iron Horse Park I site with the data sheets from Iron Horse Park II and found that it
6 appeared that the data sheets for Iron Horse Park I were reused for Iron Horse Park II.
7 *Declaration of Brad Murphy, p. 3.* It seems that only the name of the project, date, and plot
8 identification number were changed. *Compare Ecology Ex. 8 and 9.* Mr. Murphy sent a letter to
9 the consultant who prepared both of these wetland delineations on April 9, 2003. *Ecology Ex.*
10 *10.* Mr. Murphy did not receive a response to his questions from the consultant regarding the
11 discrepancies with the data sheets. *Declaration of Brad Murphy, p. 3.*

12 [5]

13 On January 21, 2004, Kariah submitted a Joint Aquatic Resource Permit Application
14 (JARPA) to the Corps for an individual § 404 Permit to fill approximately 4.52 acres of wetlands
15 on the site of the project. A copy of the JARPA was provided to Ecology on the same day for a
16 401 Certification for the proposed wetland fill for the project. *Ecology Ex. 2.*

17 [6]

18 On March 15, 2004, the Corps issued a Public Notice of Application for Permit (Corps
19 Reference No. 200400050) to solicit comment on Kariah's application for the § 404 Permit to fill
20 wetlands on the site. *Ecology Ex. 1.* The Corps attached six sheets to the public notice for the

1 permit request including separate wetland delineations prepared for the site by Applied
2 Technology⁴ and by MRM Consulting LLC⁵.

3 [7]

4 On April 13, 2004, Ecology, through Mr. Murphy, sent comments to the Corps regarding
5 the proposed Iron Horse I project. The comments indicated that the nearby Iron Horse II site is
6 almost entirely a wetland, and that a new delineation should be done on the subject property.
7 Additional comments in this letter were directed towards the adequacy of the mitigation and
8 perceived discrepancies and inadequacies. *Ecology Ex. 11*. On May 12, 2004, Kariah's counsel
9 sent a letter to Mr. Shawn Zinser of the Corps indicating that the 1999 delineation was still valid
10 and that Ecology had not demonstrated that there was new information warranting a new
11 delineation. *Ecology Ex. 12*.

12 [8]

13 Mr. Murphy conducted a site visit of the Iron Horse Park I site on May 4, 2004. Mr.
14 Murphy walked the site and looked at the landscape for wetland indicators. He analyzed
15 surrounding vegetation and dug test pits to determine if hydric soils were present. The test pits
16 showed the presence of hydric soils including areas, which had been identified as uplands in the
17 1999 delineation. *Declaration of Brad Murphy, p.4*.

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20 ⁴ Sheet 3 of 6, *Ecology Ex. 1*.

21 ⁵ The other additional sheets seem to match work prepared by MRM Consulting LLC in a Wetland Mitigation Plan they prepared for this project on December 19, 2003. This plan indicates that a delineation was conducted at the mitigation site by Brent Davis on April 24, 2002. *Ecology Ex. 10A, p.2*.

1 [9]

2 Mr. Murphy discussed the different wetland delineations at the May 4, 2004 site visit
3 with Mr. Shawn Zinszer and Mr. Ron Klump from the Corps, and Mr. Mason Wolfe with
4 Kariah. Mr. Murphy identified numerous discrepancies with the site characteristics and the
5 wetland delineations, and expressed his belief that the wetland delineations prepared by Applied
6 Technology and MRM Consulting significantly undercounted the wetlands on the site. It was
7 decided at the site to continue to use the 1999 delineation approved by the Corps. *Declaration of*
8 *Brad Murphy, p.4.*

9 [10]

10 Ecology requested Kariah to provide a new wetland delineation for the project site and
11 the mitigation site on June 11, 2004⁶ and on November 30, 2004⁷. These letters were based
12 upon the hydric soils and hydrophytic vegetation observed during the site visit. These requests
13 for more information also sought a discussion of the functions and values currently provided by
14 the wetlands. On December 14, 2004 Kariah's counsel sent a letter to Mr. Murphy indicating
15 that Kariah intended to use the delineation already accepted by the Corps for the sites. *Ecology*
16 *Ex. 15.*

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21 ⁶ Ecology Ex. 13.

⁷ Ecology Ex. 14.

1 [11]

2 On January 11, 2005 Ecology issued a denial without prejudice of Kariah's request for a
3 § 401 Certification for Iron Horse Park. *Kariah Ex. F*. The denial was based on Kariah's failure
4 to provide new wetland delineations for the project and mitigation sites.

5
6 ANALYSIS

7 [12]

8 Summary judgment is a procedure available to avoid unnecessary trials where formal
9 issues cannot be factually supported and cannot lead to, or result in, a favorable outcome to the
10 opposing party. *Jacobsen v. State*, 89 Wn. 2d 104, 108, 569 P.2d 1152 (1977). The summary
11 judgment procedure is designed to eliminate trial if only questions of law remain for resolution.

12 The party moving for summary judgment must show there are no genuine issues of
13 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
14 *Franklin Title Co., Inc.*, 131 Wn. 2d 171, 182, 930 P. 2d 307 (1997). A material fact in a
15 summary judgment proceeding is one affecting the outcome under the governing law. *Eriks v.*
16 *Denver*, 118 Wn. 2d 451, 456, 824 P. 2d 1207 (1992). If the moving party satisfies its burden,
17 then the non-moving party must present evidence demonstrating material facts are in dispute.
18 *Atherton Condo Ass'n v. Blume Dev. Co.* 115 Wn. 2d 506, 516, 799 P.2d 250 (1990),
19 *reconsideration denied* (1991). Summary judgment may also be granted to the non-moving
20 party when the facts are not in dispute. *Impecoven v. Department of Revenue*, 120 Wn.2d 357,

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1 365, 842 P.2d 470 (1992). There are no material facts in dispute, which are necessary to resolve
2 this matter. Therefore summary judgment is appropriate.

3 [13]

4 Kariah first challenges Ecology's authority to request a new wetland delineation for the
5 project impact area and the mitigation area on the basis that Ecology's role under § 401 of the
6 Clean Water Act is limited to protecting water quality in federally designated wetlands. In *Solid*
7 *Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC)*, 531 U.S. 159,
8 168, 121 S.Ct. 675 (2001), the United States Supreme Court narrowed the jurisdiction of the
9 Corps under the Clean Water Act by finding it did not extend to either seasonal ponds or
10 wetlands that are intrastate and are not adjacent to navigable waters. Kariah contends that
11 because the § 404 Permit applies only to federal waters, that Ecology's § 401 Certification is also
12 necessarily limited in scope to federal waters.

13 [14]

14 In support of its contention that the § 401 Certification is limited only to federal waters,
15 Kariah states that the Secretary of the Army is authorized under the Clean Water Act to issue
16 permits "for the discharge of dredged or fill material into the navigable water at specified
17 disposal sites."⁸ Most of this permitting authority in turn has been delegated to the Chief of
18 Engineers of the Corps and the Chief's authorized representatives.⁹ Kariah then cites to a
19

20 _____
21 ⁸ 33 U.S.C. § 1344.

⁹ 33 C.F.R. §§ 320–331.

1 regulation¹⁰ by the Corps as the basis for asserting that the Corps is the only agency authorized
2 to “determine the area defined by the terms ‘navigable waters of the United States’ and ‘waters
3 of the United States’ . .” Under Kariah’s reasoning, Ecology therefore cannot ask Kariah to
4 perform another wetland delineation because the Corps already has accepted a delineation for the
5 site, and the Corps is the only entity that can determine the boundaries of waters of the United
6 States for purposes of federal permits.

7 [15]

8 Kariah’s argument that the Corps is the only agency, federal or state, with authority to
9 define “waters of the United States” is incorrect. In defining the meaning of “waters of the
10 United States,” the Environmental Protection Agency (EPA) is “the final authority regarding
11 Clean Water Act jurisdiction....”¹¹ Furthermore, district engineers are authorized to determine
12 the area constituting “navigable waters of the United States” and “waters of the United States”
13 unless “EPA makes a section 404 jurisdiction determination under its authority.” 33 C.F.R. §
14 325.9(b).

15 [16]

16 In addition, the Corps does not regulate prior converted croplands (wetlands which are in
17 agricultural production that may still meet wetland hydrology criteria but have been drained and
18 tilled in order to grow crops) until they are converted to non-agricultural use. The Corps has an
19 agreement with the Natural Resource Conservation Service (NRCS) that gives NRCS the

20 ¹⁰ 33 C.F.R. § 325.9.

21 ¹¹ 40 C.F.R. §230.3(s)(3).

responsibility for delineating wetlands on prior converted croplands for purposes of establishing federal jurisdiction. *Declaration of Perry Lund*; 33 C.F.R. § 328.3(a)(8). Kariah also fails to cite to any authority, which holds that a state is limited to only addressing impacts to waters of the United States under a § 401 Certification. As discussed below, the United States Supreme Court and the Washington Supreme Court have recognized the broad authority Ecology has to regulate water quality under a § 401 Certification.

[17]

Furthermore, § 401 of the Clean Water Act includes a state certification process that while triggered by federal permit or licensing action, is not limited in scope by the extent of federal jurisdiction. 33 U.S.C. § 1341(a) requires a § 401 Certification for “any applicant for a Federal license or permit” for “activity. . . ., which may result in any discharge into the navigable waters, . . . that any such discharge will comply with the applicable provisions of [the Clean Water Act].” A § 401 Certification issued by the state must contain a statement that there is a reasonable assurance that the activity for which the permit or license is sought will not violate applicable water quality standards. 40 C.F.R. § 121.2(3). No license or permit may be issued if the state denies the § 401 Certification. 33 U.S.C. § 1341(a)(1). In addition, 33 U.S.C. § 1341(d) requires:

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a federal license or permit will *comply* with any applicable effluent limitations and other limitations, . . . and *with any other appropriate requirement of State law* set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section. (emphasis added).

1 [18]

2 The United States Supreme Court addressed the scope of the State’s authority when
3 reviewing an application for a § 401 Certification in *Public Utility District No. 1 of Jefferson*
4 *County v. Ecology*, 511 U.S. 700, 114 S. Ct. 1900, 128 L. Ed.2d 716 (1994) (*Elkhorn II*). The
5 Court focused on the language in § 401(d) and found this section “is most reasonably read as
6 authorizing additional conditions and limitations on the activity as a whole once the threshold
7 condition, the existence of a discharge, is satisfied.” 511 U.S. at 712.

8 [19]

9 In *Elkhorn II*, the U.S. Supreme Court observed that § 303 of the Clean Water Act
10 requires each state to establish, subject to federal approval, comprehensive water quality
11 standards that set forth water quality goals for all intrastate waters.¹² The state water quality
12 standards “shall consist of the designated uses of the navigable waters involved and the water
13 quality criteria for such waters based upon such uses.” *Id.* at 704 (quoting 33 U.S.C. §
14 1313(c)(2)(A)).

15 [20]

16 The U.S. Supreme Court also emphasized that § 303 contains an antidegradation policy
17 to ensure that state standards are adequate to maintain existing beneficial uses of navigable
18 waters and prevent their further degradation. *Id.* at 705. The Court then recognized that “EPA’s
19 regulations implementing the Act require that state water quality standards include ‘a statewide
20 antidegradation policy’ to ensure that ‘[e]xisting instream water uses and the level of water

quality necessary to protect the existing uses shall be maintained and protected.’ 40 C.F.R. § 131.12(1993). . . The Act also allows States to impose more stringent water quality controls. See 33 U.S.C. §§ 1311(b)(1)(C), 1370” *Id.*

[21]

In upholding the minimum stream flow requirements imposed on the Elkhorn project, the U.S. Supreme Court stated:

We agree with the State that ensuring compliance with § 303 is a proper function of the § 401 certification. Although § 303 is not one of the statutory provisions listed in § 401(d), the statute allows States to impose limitations to ensure compliance with § 301 of the Act, 33 U.S.C. § 1311 Section 301 in turn incorporates § 303 by reference. . . . *As a consequence, state water quality standards adopted pursuant to § 303 are among the “other limitations” with which a State may ensure compliance through the § 401 certification process. . . . Moreover, limitations to assure compliance with state water quality standards are also permitted by § 401(d)’s reference to “any other appropriate requirement of State law.”*

511 U.S. at 712-13. (emphasis added)

[22]

Under RCW 90.48.260, Ecology is designated as the agency responsible for implementing the requirements of the Clean Water Act at the state level. This includes adopting state water quality standards. In *PUD No. 1 of Pend Oreille County v. Department of Ecology*¹³, 146 Wn.2d 778, 51 P.3d 744 (2002)(Sullivan Creek), the Washington Supreme Court recognized Ecology’s authority under RCW 90.48.260 to adopt both water quality standards, including the

¹² 33 U.S.C. §§ 1311 (b)(1)(C); 1313.

¹³ This case also involved a § 401 Certification,

antidegradation policy. The Court emphasized that Ecology was authorized “*to take all action necessary*” to secure benefits under and meet the requirements of the Clean Water Act. 146 Wn.2d at 818-19 (emphasis added). The Court also stated that Ecology’s authority under this statute was broad. 146 Wn.2d at 819. RCW 90.48.035 authorizes Ecology to adopt rules necessary to implement the state and federal Clean Water Act.

[23]

The state’s antidegradation policy is set forth in statute at RCW 90.54.020(3)(b) and provides:

Waters of the state shall be of high quality. Regardless of the quality of the water of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry. Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served.

The water quality standards adopted by Ecology include a similar antidegradation policy at WAC 173-201A-070. This WAC provides “[e]xisting beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses shall be allowed.” WAC 173-201A-070(1).

[24]

Under the *Elkhorn II* and *Sullivan Creek* decisions, it is settled law that state water quality standards, including the antidegradation policy, adopted by Ecology pursuant to § 303 of the Clean Water Act may be included in Ecology’s § 401 Certification decision. The state water quality standards adopted by Ecology are at WAC Chapter 173-201A. The state water quality

standards apply to “waters of the state,” not just to “navigable waters,” which is the basis for federal jurisdiction under the § 404 permitting program. Under the state water quality standards, “wetlands” are included as “waters of the state.”

[25]

Kariah argues that because “wetlands” are not specifically included in the definition of “waters of the state” in RCW Chapter 90.48, that Ecology has exceeded its authority by including “wetlands” in the definition of “surface waters of the state” in WAC Chapter 173-201A, the state water quality standards. Ecology acknowledges that the definitions of “waters of the state” in state law and regulation differ slightly, but argues that the state water quality standards, which include wetlands as a water of the state are consistent with the authority granted by the Legislature. The Board does not have jurisdiction to consider a facial challenge to a rule adopted by Ecology, *Seattle v. Department of Ecology*, 37 Wn. App. 819 (1984), but it does have jurisdiction to consider the consistency of rules with the underlying statutes as applied. *D/O Center v. Department of Ecology*, 119 Wn.2d 761, 774 (1992).

[26]

RCW 90.48.020 defines "waters of the state" as including “ . . . lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters and watercourses within the jurisdiction of the state of Washington.” Ecology’s water quality standards rule defines "Surface waters of the state" as including “ . . . lakes, rivers, ponds, streams, inland waters, saltwaters, wetlands and all other surface waters and water courses within the jurisdiction of the state of Washington.” WAC 173-201A-070.

[27]

Notably, both the definition of “waters of the state” at RCW 90.48.020 and “surface waters of the state” at WAC 173-201A use the term of expansion¹⁴ that waters of the state *include* “all other surface waters and water courses.” (emphasis added). Thus, while RCW 90.48.020 does not specifically list “wetlands” as a water of the state, the inclusion of “wetlands” in Ecology’s rule is consistent with the Legislature’s direction to Ecology to include “all other surface waters” as those waters of the state to be protected by the state water quality standards. WAC 173-201A-020 also defines “wetlands,” “created wetlands,” and “bog.” These definitions have been approved by EPA, which reviews state water quality standards for compliance with the Clean Water Act, a requirement for delegating Clean Water Act implementation to the state.¹⁵

[28]

Kariah further argues that even if Ecology has statutory authority to regulate wetlands, that it cannot do so until it has promulgated rules or regulations to govern such actions. Ecology denies the need to adopt rules to regulate the discharge into isolated wetlands on two separate bases: (1) Ecology is directly implementing its statutory authority under Chapter 90.48

¹⁴ The term “includes” within a definition section is construed as a term of enlargement. *Queets Band of Indians v. State*, 102 Wn.2d 1, 4, 682 P.2d 909 (1984).

¹⁵ Ecology adopted new water quality standards in 2003. The water quality standards revisions have been partially approved by EPA. Pending final approval by EPA, the water quality standards relevant to this case are those adopted in 1997, which include the definitions (WAC 173-210A-020), antidegradation (WAC 173-201A-070), and application of water quality standards (WAC 173-201A-260).

1 RCW without any additional requirements not specified in statute; and (2) wetlands are so
2 unique they need to be regulated on a case-by-case basis.

3 [29]

4 Ecology regulates wetlands through a number of different regulatory mechanisms. The
5 mechanism at issue in this case is a § 401 Certification. Ecology has in fact adopted a rule
6 governing § 401 Certifications at WAC Chapter 173-225, which provides basic procedural
7 requirements. As discussed above, the § 401 Certification process invokes the substantive
8 provisions of the state water quality standards, also adopted as a rule in WAC Chapter 173-
9 201A. Thus, Kariah is incorrect that “Ecology has adopted no rules or regulations to govern its
10 attempt to regulate wetlands.” (emphasis in original) (*Kariah Mtn. at 14*) In this case, Ecology’s
11 regulation of wetlands is based on RCW 90.48.260 and 90.54.020, and WAC Chapters 173-201A
12 and 173-225.

13 [30]

14 It is unnecessary for the Board to reach Kariah’s issue that Ecology failed to engage in
15 appropriate rulemaking to regulate wetlands. This is because the Board has found that the § 401
16 Certification may include provisions to address impacts to all state waters, including isolated
17 wetlands. The case before the Board pertains to whether Ecology’s § 401 Certification decision
18 complied with applicable law and regulation. Consistent with this, the Board’s decision in this
19 case concerns only whether additional rulemaking is required in the context of a § 401
20 Certification relating to a § 404 wetland permit, it does not concern how rulemaking
21 requirements may apply to other regulatory mechanisms used by Ecology to regulate wetlands.

1
2 [31]

3 Kariah has stated that it was inappropriate for Ecology to request Kariah to provide
4 another wetland delineation for the impact site and the mitigation site before issuing a § 401
5 Certification. The Maine Supreme Court upheld the denial of a § 401 Certification on the basis
6 that the applicant did not respond to the agency's request for more information regarding the
7 project's impact upon fish habitat. The court found that the designated uses under the state's
8 water quality standards included fish habitat. *Bangor Hydro-Electric Co. v. Board of*
9 *Environmental Protection*, 595 A.2d 438 (1991).¹⁶ Because the Board has found that the Corps
10 is not the only federal entity with jurisdiction over the delineation of wetlands and that
11 compliance with state water quality standards in a § 401 Certification relating to wetlands may
12 have a different scope than the underlying federal wetland permit that necessitated the § 401
13 Certification, it finds that Ecology acted appropriately in requesting Kariah to provide another
14 delineation of wetland impacts and mitigation.

15 [32]

16 Finally, Kariah states that any authority Ecology did have for regulating wetlands was
17 delegated to local governments under the Growth Management Act (GMA). Under GMA, all
18 cities and counties in the state are required to designate¹⁷ and protect critical areas.¹⁸ Wetlands

19
20 ¹⁶ This decision was cited approvingly by the Washington Supreme Court in its *Elkhorn* opinion. 121 Wn.2d 179,
188 (1993).

21 ¹⁷ RCW 36.70A.170.

¹⁸ RCW 36.70A.060(2)

are included within the definition of “critical areas” for purposes of the GMA.¹⁹ Cities and counties are required to include best available science in developing policies and development regulations for the protection of functions and values of critical areas.²⁰ The establishment of buffers to protect the wetlands from adjacent activity is also contemplated under the GMA.²¹ Ecology is directed under the GMA to provide consulting assistance to the Department of Community, Trade and Economic Development.²²

[33]

Kariah fails to cite any express provision in chapters 90.48 RCW or 36.70A RCW, which delegates Ecology’s authority over protecting water quality in wetlands to cities and counties. Repeal or amendment by implication is not favored under the law. *Misterek v. Washington Mineral Products, Inc.*, 85 Wn.2d 166, 168, 531 P.2d 805 (1975). In contrast, statutes are to be read together harmoniously whenever possible. “The construction of two statutes shall be made with the assumption that the Legislature does not intend to create an inconsistency.” *Peninsula Neighborhood Ass’n v. Dep’t of Transportation*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000). The Legislature has granted Ecology broad authority to regulate wetlands. When the Legislature has sought to preempt Ecology’s authority to regulate water quality, it has done so expressly. *See* RCW 90.48.262(2) (authorizing the Energy Facility Site Evaluation Council to administer discharge permits under certain circumstances). In addition, RCW 90.48.010 sets forth the

¹⁹ RCW 36.70A.030(5)

²⁰ RCW 36.70A.172

²¹ RCW 36.70A.480(6)

²² RCW 36.70A.050.

1 policy of the chapter regarding water pollution control within the state. After first
2 acknowledging the need to work cooperatively with the federal government to extinguish the
3 sources of water quality degradation, this section notes the importance of working vigorously to
4 protect water quality within the state “through and by the efforts of *state government* of the state
5 of Washington.”(emphasis added). The legislative policy articulated in RCW 36.70A.010
6 indicates the GMA was directed at addressing uncoordinated and unplanned growth, not at
7 shifting the responsibility to regulate wetlands from the state government to local governments.
8 The Board disagrees with Kariah that Ecology’s authority to regulate wetlands has been
9 preempted by the enactment of the GMA.

10 **ORDER**

11 IT IS ORDERED that:

- 12 1. The Motion for Partial Summary Judgment is GRANTED in favor of Ecology.
- 13 2. The remaining issue will be decided at the hearing on the merits.

14 Done this 6th day of January 2005.

16 **POLLUTION CONTROL HEARINGS BOARD**

17 William H. Lynch, Presiding

18 Bill Clarke, Chair

19
20
21 ORDER GRANTING
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